

**SPEECH OF JUDGE JOAN E. DONOGHUE,  
PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE,  
AT THE 72ND SESSION OF THE INTERNATIONAL LAW COMMISSION**

**22 July 2021**

Mr. Chairman,  
Ladies and gentlemen,  
Colleagues and friends,

I am honoured to address the International Law Commission on the occasion of its seventy-second session. I would like to take this opportunity to congratulate the Officers of the Commission on their election and you, Mr. Chairman, on behalf of the International Court of Justice.

I shall begin my remarks by commemorating a common friend of the Court and the Commission, Judge James Crawford, who passed away last May. Many of you knew James as a friend and colleague. His contributions are familiar to you, so I shall not recount them. Instead, I would like to say a bit about the way in which we honoured his passing at the Peace Palace in The Hague.

During the past 75 years, a few judges of the Court have died in office. The tradition has been for the Dutch Government, working with the Court, to organize a state funeral. Such an event took place in James's honour, but with adjustments due to the pandemic. James's casket was draped with the flag of the United Nations. Uniformed Dutch officers carried the casket into the Great Hall of Justice, where a small number of family, friends and Members of the Court were present, all of us masked and distanced. After brief remarks, the Dutch officers folded the flag into a triangle and presented it to me, as President of the Court. I then presented the flag to James's wife, with their brave young son standing by her side.

It was sombre and formal affair but at the same time a very moving one. In these days of COVID-induced sterility, when we interact on screens, keep our distance even when we are together in a room, and use sanitizer constantly throughout the day, I wanted to share with you this very personal and humanizing event at the Court before moving on to more substantive matters.

Judge Crawford was fascinated by what he described as the “symbiotic” yet “dialectical” relationship that has developed between the Commission and the Court since their establishment, irrespective of the “completely different tasks” of these two bodies<sup>1</sup>. I am grateful that, today, I have the opportunity to contribute to the ongoing dialogue between our respective institutions by continuing the long-standing tradition of the annual exchange of views between the President of the Court and the Commission. I look forward especially to an informal exchange of views with the members of the Commission after I conclude my prepared remarks.

Two years have passed since my predecessor, President Abdulqawi Yusuf, last addressed the Commission in July 2019. Since then, the COVID-19 pandemic has caused unimaginable suffering, dramatically changing the daily lives of millions of men and women around the world. The International Court of Justice — like the Commission and virtually all other national and international institutions — has faced unprecedented challenges in pursuing its mandate in the

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<sup>1</sup> J. Crawford, “The International Court of Justice and the Law of State Responsibility” in: C. J. Tams & J. Sloan (eds.), *The Development of International Law by the International Court of Justice*, OUP, 2013, pp.74-75.

context of this public health crisis. So I would like to start with a few words about the Court's response to the ongoing pandemic.

When the pandemic first hit the Netherlands, in the spring of 2020, the Court decided to postpone all hearings and meetings, suspend all official travel, cancel all visits and reduce to a minimum the physical presence of staff at the Peace Palace. Over the following weeks, it became increasingly clear that the pandemic was not waning and thus that the Court needed to adapt its methods of work to the new circumstances. The Court started to hold internal meetings via videoconference, with judges joining from their respective offices at the Peace Palace or from another location, to ensure a continued focus on judicial matters. Throughout, we have continued to work in both official languages of the Court.

Thanks to the initiative and hard work of the former President, the Registrar and their staffs, we have also made a transition to hybrid hearings. In those hearings, some judges are physically present in the Great Hall of Justice, while others participate remotely by video link. A small number of representatives of the parties and their counsel are also permitted to join the proceedings in person, while others address the Court remotely using dedicated videoconferencing technology. We have arrangements for counsel to display demonstrative exhibits on screen, as they would at an in-person hearing. Those exhibits are visible to all judges, wherever located. And we are rigorous about technical testing by all participants in advance of each hearing.

In 2020, the Court amended Articles 59 and 94 of its Rules, clarifying that, for health, security or other compelling reasons, the Court may decide that hearings will be held entirely or in part by video link or that the reading of judgments will take place by video link<sup>2</sup>. Relatedly, the Court also issued "Guidelines for the parties on the organization of hearings by video link"<sup>3</sup>.

With these measures in place, over the past year, the Court delivered six judgments by video link<sup>4</sup> and held hybrid hearings in five cases<sup>5</sup>.

I shall now provide a brief account of the Court's judicial activities since July 2019, which was the last opportunity for the President of the Court to address the Commission. During that period, the Court delivered eight judgments.

On 17 July 2019, the Court issued its Judgment on the merits in the *Jadhav* case (*India v. Pakistan*), a case instituted by India following the arrest and detention of an Indian national, Mr. Jadhav, who was accused by Pakistan of acts of espionage. In April 2017, Mr. Jadhav was sentenced to death by a military court in Pakistan. India argued that consular access was being denied to him in violation of the 1963 Vienna Convention on Consular Relations. The Court rejected Pakistan's arguments that the rights relating to consular access set out in Article 36 of that

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<sup>2</sup> Rules of Court, as amended in 2020.

<sup>3</sup> Guidelines for the parties on the organization of hearings by video link, 13 July 2020.

<sup>4</sup> *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)* and *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)* on 14 July 2020; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* on 11 December 2020; *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)* on 18 December 2020; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)* on 3 February 2021; and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* on 4 February 2021.

<sup>5</sup> *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)* on 30 June 2020; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* from 31 August to 7 September 2020; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)* from 14 to 21 September 2020; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* from 15 to 18 March 2021; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* from 20 to 30 April 2021.

Convention did not apply in situations where the individual concerned was suspected of carrying out acts of espionage. The Court further found that Pakistan's making of the relevant consular notification some three weeks after Mr. Jadhav's arrest constituted a breach of its obligation to inform India's consular post "without delay", as required by Article 36. The Court decided that the appropriate reparation was for Pakistan to provide, by means of its own choosing, effective review and reconsideration of Mr. Jadhav's conviction and sentence. The Judgment set out certain essential elements of what would constitute effective review and reconsideration in this case: Pakistan was required to ensure, first, that full weight be given to the effect of the violation of the rights set forth in the Vienna Convention and, second, that the violation and the possible prejudice caused by it be fully examined. The Court also held that a continued stay of Mr. Jadhav's execution was an indispensable condition for effective review and reconsideration of the conviction and sentence.

On 8 November 2019, the Court delivered a Judgment on the preliminary objections raised by the Russian Federation in the case concerning *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*. This case concerns alleged breaches by the Russian Federation of those two conventions arising out of events which occurred in eastern Ukraine and in Crimea. In its Judgment, the Court found that it had jurisdiction, under both conventions, to entertain the claims made by Ukraine and that the Application was admissible in relation to the claims under CERD. Thus, the case has now proceeded to the merits stage.

On 14 July 2020, the Court rendered judgments in two closely related cases, both of which were appeals relating to the jurisdiction of the ICAO Council. These two cases pertained to certain aviation-related restrictions adopted by several States against the State of Qatar in June 2017. Pursuant to the Chicago Convention and the International Air Services Transit Agreement (or "IASTA"), Qatar filed two applications with the ICAO Council. Qatar claimed that, by adopting these restrictive measures, Bahrain, Egypt, Saudi Arabia and the United Arab Emirates ("UAE") had violated their obligations under the Chicago Convention, and that Bahrain, Egypt and the UAE had violated their obligations under the IASTA. In both cases, the States that were respondents before the ICAO Council raised preliminary objections to the jurisdiction of the Council, which the Council rejected. It was against these two decisions of the ICAO Council that those States appealed in two separate cases submitted to the Court on the basis of Article 84 of the Chicago Convention and Article II of the IASTA. In both cases, the Court rejected the appeal, confirming that the ICAO Council had jurisdiction to hear the cases and that the applications filed by Qatar before the Council were admissible.

On 11 December 2020, the Court delivered its Judgment on the merits in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*. The Applicant alleged that a building located on avenue Foch in Paris was the premises of its embassy and thus was entitled to inviolability and other protections set out in Article 22 of the Vienna Convention on Diplomatic Relations of 1961. The French authorities had taken certain measures with respect to the property in question in the context of a criminal investigation, including searches of the building and seizure of certain items. According to Equatorial Guinea, these measures violated the receiving State's obligations under the Vienna Convention. In its Judgment, the Court concluded that the Convention could not be interpreted so as to allow a sending State unilaterally to impose its choice of mission premises upon the receiving State where the latter has objected to this choice, provided that the objection is communicated in a timely manner and is neither arbitrary nor discriminatory in character. It found that the building on avenue Foch had never acquired the status of premises of the mission and thus that France had not violated its obligations under Article 22 of the Convention.

On 18 December 2020, the Court delivered its Judgment on jurisdiction in the case concerning the *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*. Guyana instituted this proceeding, requesting the Court, *inter alia*, to confirm the validity of this Arbitral Award, as well as of the land boundary established pursuant to the Award. Venezuela responded that it considered that the Court manifestly lacked jurisdiction and announced that it would not participate in the proceedings.

On 30 June 2020, the Court held a hearing in which only Guyana participated. In its Judgment of December 2020, the Court found that it had jurisdiction to entertain the Application filed by Guyana in so far as it concerned the validity of the Arbitral Award and the related question of the definitive settlement of the land boundary dispute between the two States. The Court also found that it did not have jurisdiction over certain other claims of Guyana. The case has now proceeded to the merits stage.

I turn next to the case concerning *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*. The case was instituted by the Islamic Republic of Iran against the United States on the basis of the compromissory clause contained in a bilateral treaty. Iran's claims centre on the decision of the United States in May of 2018 to reimpose a number of restrictive measures on Iran and Iranian nationals and companies. On 3 February 2021, the Court rendered its Judgment on the preliminary objections raised by the United States and found that it had jurisdiction, on the basis of the treaty, to entertain the Application filed by Iran and that the Application was admissible. The case is now proceeding to the merits phase.

Finally, on 4 February 2021, the Court rendered its Judgment on preliminary objections in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*. The case was initiated by Qatar on the basis of the compromissory clause of CERD. Qatar's Application concerned a series of measures taken by the UAE on or after 5 June 2017, including the severance of diplomatic relations with Qatar, the closure of UAE airspace and seaports for "Qataris", certain measures relating to Qatari media and speech in support of Qatar, and measures which Qatar characterized as "travel bans" for Qatari nationals and the "expulsion" of Qatari residents and visitors from the UAE. Qatar contended that these measures violated the UAE's obligations under CERD. The UAE raised two preliminary objections to the jurisdiction of the Court and the admissibility of the Application. A central question for the Court was whether the term "national origin" in the definition of racial discrimination in Article 1, paragraph 1, of CERD encompasses current nationality. The Court found that that was not the case and, consequently, that the measures complained of by Qatar that were based on the current nationality of its citizens did not fall within the scope of CERD. The Court further held that CERD only concerns racial discrimination against individuals or groups of individuals and thus that Qatar's claim relating to Qatari media corporations did not fall within the scope of CERD. With respect to Qatar's claim of indirect discrimination, the Court found that the relevant measures did not entail, either by their purpose or by their effect, racial discrimination within the meaning of CERD. The case has been removed from the Court's docket.

Before wrapping up this overview of the Court's recent judicial activities, I would like to say a few words about the Court's Order on provisional measures in the case between The Gambia and Myanmar. The case, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, involves alleged violations by Myanmar of the Genocide Convention in relation to the Rohingya group in Myanmar. The Gambia's Application also requested a series of provisional measures. In its Order of 23 January 2020, the Court unanimously indicated provisional measures, ordering Myanmar, *inter alia*, to take all measures within its power, in accordance with its obligations under the Genocide Convention, to prevent the commission of all acts within the scope of Article II of the Convention in relation to members of the Rohingya group in its territory.

It is also noteworthy that, in the calendar year 2020, no new cases were brought before the Court, a break from the pattern that we have seen in recent years. My personal hope is that this is a temporary phenomenon triggered by the COVID-19 pandemic. So far in 2021, one new case has been submitted. On 5 March 2021, proceedings were instituted by way of a Special Agreement between the Gabonese Republic and the Republic of Equatorial Guinea in the case concerning *Land and Maritime Delimitation and Sovereignty over Islands*.

I will also mention that, on 24 September 2019, the Republic of Latvia deposited a declaration recognizing the jurisdiction of the Court as compulsory, pursuant to Article 36, paragraph 2, of the Court's Statute, bringing the total number of such declarations to 74.

I have described recent developments at the ICJ in a manner that sounds quite positive. The Court has managed to fulfil its mission despite the pandemic. The docket has been busy with cases on diverse topics with parties from various regions of the world. And in Geneva, the Commission is also hard at work on its own rich and diverse programme.

Does this mean that all is well in these two important institutions of international law? To answer this question, I think it behoves the members of both the ICJ and the Commission to step back from our day-to-day work in the analysis and drafting of legal texts, bearing in mind that calm surface waters can obscure the churning and currents that lie deep below.

The ICJ and the Commission are part of a post-World War II architecture of international law and international institutions. Taken together, the two institutions embody two closely linked ideals, that States would settle disputes peacefully in court and that the content of international law could be codified and progressively developed.

Of course, international law has not stood still since the 1940s. Both the substantive content of international law and the associated international institutions have evolved, largely in positive ways. The peoples of the world who were living in colonial arrangements in the 1940s had no meaningful input into the post-World War II framework. Now the States in which they live play an important role in international institutions, as they should. Human rights treaties and treaties on other topics, such as the environment, establish rules and promote values that should be cherished and nurtured.

However, as we all know, we now find ourselves in a period in which there are voices in the international community that raise questions about the values embodied in international law and about institutions that promote and apply international law. These include some who emphasize the sovereignty of States and impugn international bureaucrats, and others who seek to suppress the diversity of opinion at home and abroad.

A related phenomenon, which affects both the Court and the Commission, is the difficulty of finding broad support for the negotiation and adoption of multilateral treaties. The Commission's own very fine draft articles on the prevention and punishment of crimes against humanity have confronted this problem.

As treaty-making becomes more difficult, it is no surprise that we see interest in other means of developing, enshrining and creating rules of international law. There is of course scope for both the Court and the Commission to participate in the development of international law. And there may be a view in some quarters that both of our institutions should be more proactive in what might be seen as law-making.

My own perspective is that the larger political dynamics suggest quite the opposite. Today, more than ever, the Court and this Commission cannot presume that they derive their legitimacy and authority from their pedigrees as United Nations organs or from the biographies of their distinguished members. We must be prepared to earn the respect of States and other observers every day, in all that we do. One way that we can do so is by stating and justifying our conclusions on legal issues clearly and comprehensively, mindful of the divergent views held by those who read the Court's decisions and the Commission's reports.

When I think about the way that our legal texts are received by various audiences, I am reminded of mathematics exams in elementary school. Some teachers gave only partial credit if the student gave the correct answer without indicating the steps that gave rise to the answer. In subtracting points, the teacher wrote, “Show your work!”.

Both at the ICJ and in the Commission, I consider that we should keep this admonition in mind. I will mention a couple of specific examples of situations in which I think that we could do better, the first relating to pronouncements regarding the existence and the content of customary international law.

This is a topic that the Commission itself has addressed in the draft conclusions on identification of customary international law, adopted in 2018. In those draft conclusions, the Commission recalls the two-element test to be used to determine the existence and content of such a rule, stating that it is “necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)” (Conclusion 2). The draft conclusions then go on to set out the kinds of evidence relevant to determining the existence and content of a rule of customary international law and the means of assessing that evidence. The draft conclusions leave the impression that the Commission expects a court, a State or a scholar to indicate reasons grounded in both elements, before pronouncing on the existence or content of customary international law.

Sometimes the reasoning of the Court or the commentary by the Commission does exactly that. But at other times, an ICJ judgment or a Commission report makes a claim that a particular rule is part of customary international law on the basis of little or no supporting reasoning. I consider this practice to be ill-advised.

An assertion by the Commission or the ICJ as to the existence and content of customary international law may be seen as per se authoritative by some, including those who welcome the content of the assertion. However, an unsubstantiated conclusion on the existence or content of a rule may be easily criticized and may detract from the overall credibility of the Court or the Commission.

In a similar vein, I believe that both institutions should be cautious about placing too much weight on cross-citation, i.e. the Court’s citation of the Commission’s outputs as authoritative and the Commission’s frequent citation of the Court as authority. Cross-citation as a means of supporting a particular proposition is convenient and efficient. It may also be seen to reflect the respect that each institution has for the other. However, I consider that both of our institutions owe it to the Member States of the United Nations and other readers to set out convincing substantive reasons for our conclusions on the law, beyond observing that the other institution has stated a concordant view.

If the two institutions offer meagre reasons for their conclusions on the existence and content of customary international law and rely excessively on cross-citation, we set ourselves up to be criticized for what James Crawford once described as “[c]ustomary international law by stealth”<sup>6</sup>. The substance of our specific conclusions and the overall authority of our pronouncements could therefore be diminished.

Both in my former role as a foreign ministry lawyer and as a judge for the past eleven years, I have benefitted enormously from the work of the Commission on many topics. So I do not wish to leave you with the impression that I have taken the virtual podium today in order to be critical of the Commission. You will have noticed that in my musings I have spoken about the reasoning of both the Court and the Commission. I am raising some ideas, if you will, inside the family, in the hope of provoking further thought and reflection. And, of course, as in any family, I do not expect my ideas to be shared by all. Instead, I am always open to learning from the perspectives of others.

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<sup>6</sup> J. Crawford, “Chance, Order, Change: The Course of International Law”, *Collected courses of the Hague Academy of International Law*, Vol. 365, 2013, p. 108.

At this point, Mr. Chairman, I propose to conclude my remarks. I look forward to a discussion with the members of the Commission. I am aware that a number of you are involved as counsel before the Court and I am confident that you will be careful not to raise questions about pending matters. With that exception, I am open to a discussion of whatever topics interest the members of the Commission.

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